No. 802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

ON APPEAL FROM THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

NETTIE SMITH,
Appellant,

vs:

HUNTER SMITH,
Appellee

MOTION TO DISMISS OR AFFIRM AND STATEMENT OPPOSING JURISDICTION

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INDEX

	Page
Motion to Dismiss or Affirm	1
Decree and Opinion Below	2
Statement of the Case and Facts	2
Discussion Opposing Jurisdiction	8
(A) Is a Substantial Federal Question Presented?	8
(B) Was the Federal Question Sought to Be Reviewed Timely or Properly Raised?	10
(C) Was the Federal Question Sought to be Reviewed Expressly Passed on?	11
(D) Does the Judgment of the Lower Court rest upon an Adequate Nonfederal Basis?	12
Conclusion	14
Proof of Service	15

CASES, AUTHORITIES AND STATUTES CITED

Black v. Cutter Laboratories, 351 U. S. 292	13
Charleston Federal Savings and Loan Association v. Alderson, 324 U. S. 182	11
Consumer Credit Company of Waynesburg v. Bowers, 143 W. Va. 748, 104 S. E. (2d) 869	9
Davis v. Davis, 137 W. Va. 213, 70 S. E. (2d) 889	12
Durley v. Mayo, 351 U. S. 277	13
Hulvey v. Roberts, 106 Va. 189, 55 S. E. 585	11
Michie's Jurisprudence of Virginia and West Virginia, Vol. 1, Appeal and Error, Sec. 83	11
Paull v. Cook, 135 W. Va. 833, 65 S. E. (2d) 750	9
Raley v. State of Ohio, 360 U. S. 423	11
State of West Virginia v. Michael, 141 W. Va. 1, 87 S. E. (2d) 595	11
Stembridge v. State of Georgia, 343 U. S. 541	11
Virginian Railway Company v. Mullens, 271 U. S. 220	10
West Virginia Code of 1955, Chapter 48, Article 2, Section 10	9
Wheat v. Wheat, 318 S. W. (2d) 793	9
Williams v. North Carolina, 325 U. S. 226	8
Wolford v. Wolford, 133 W. Va. 403, 56 S. E. (2d) 614	12
82 C. J. S., Statutes, Sections 314-315	8

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vs:

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Appellee

MOTION TO DISMISS OR AFFIRM

For the following reasons and based upon the following facts and authorities appellee, pursuant to Rule 16 (1) (b) of the Revised Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal of appellant on the grounds that (a) it does not present a substantial federal question, (b) the federal question sought to be reviewed was not timely or properly raised, or not expressly passed upon, and (c) the decree rests upon an adequate nonfederal basis; or in the alternative moves to affirm the decree of the Circuit Court of Raleigh County, West Virginia.

Respectfully submitted,

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G. BERK LYNCH
JAMES M. HENDERSON
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Counsel for Appellee

DECREE AND OPINION BELOW

The opinion of the Circuit Court of Raleigh County, West Virginia, is set forth on pages 50 through 56 of the Appendix to the Jurisdictional Statement.

The decree of that Court sustaining defendant-appellee's motion to dismiss plaintiff-appellant's bill of complaint and entering decretal order in appellee's favor is set forth on pages 45 through 49 of said Appendix to the Jurisdictional Statement.

Appellant's two separate applications to the Supreme Court of Appeals of West Virginia, for an appeal from said decree, which said Supreme Court twice refused to award, are set forth on pages 57 and 58 of the Appendix to the Jurisdictional Statement.

I

STATEMENT OF THE CASE AND FACTS

This case was instituted in the Circuit Court of Raleigh County, West Virginia, on the Chancery side thereof, on October 22, 1958, when Nettie Smith, Appellant herein and plaintiff below, filed her Bill of Complaint against Hunter Smith, Appellee herein and defendant below, seeking a decree awarding to her separate maintenance and support money as the wife of the Appellee. On December 2, 1958, Appellee filed a Plea in Bar to said Bill of Complaint, supported by a duly authenticated copy of a divorce decree entered by the Chancery Court of Garland County, State of Arkansas, on November 12, 1957, which granted unto Hunter Smith a decree of absolute divorce from Nettie Smith. (Ap-

pendix - Jurisdictional Statement, pages 62-64). Subsequently, a series of Amended and Supplemental Bills of Complaint and Amended and Supplemental Answers thereto were filed by appellant and appellee, respectively. The issues were ultimately joined upon appellant's Second Amended and Supplemental Bill of Complaint, and appellee's Answer thereto and upon appellee's Plea in Bar supported by the aforesaid divorce decree.

The appellee, Hunter Smith, defended against the suit by the assertion of two propositions: that is (a) the plaintiff, Nettie Smith, was no longer the wife of Hunter Smith by virtue of the Arkansas divorce decree, and, therefore, was not entitled to any support and maintenance; and (b) Nettie Smith was guilty of desertion of Hunter Smith, and consequently was not entitled to relief.

We do not deem it necessary to set forth the facts concerning the series of marital discord incidents between appellant and appellee. Suffice it to say, that in 1943 appellant and appellee had been divorced by a decree of divorce rendered in the State of Arkansas. Subsequently, appellant and appellee were remarried in the State of Arkansas on August 18, 1953. Thereafter, they lived together as husband and wife in the City of Beckley, State of West Virginia, until on or about February 27, 1957, at which time they separated and did not thereafter resume marital relations. Subsequently, Hunter Smith, appellee herein, was granted a decree of absolute divorce from Nettie Smith by the Chancery Court of Garland County, State of Arkansas, on Novem-

ber 12, 1957, which said decree remains unappealed from and unreversed.

The divorce decree of the State of Arkansas as relied on by appellee, in addition to granting Hunter Smith an absolute divorce from Nettie Smith, also awarded to the said Nettie Smith alimony in the amount of Three Hundred Dollars ($300.00) per month.

It will be noted that appellant in the instant suit introduced no evidence in support of her allegations that alimony payments were delinquent or the sum total of any purported delinquency.

The record further shows that subsequent to the granting of the Arkansas divorce, appellant was successful in obtaining a judgment in the United States District Court for the Southern District of West Virginia, against appellee, for the sum of Fifty-eight Thousand Two Hundred Ninety-seven Dollars and Sixty-two Cents ($58,297.62), which judgment, together with interest and costs, was duly paid by appellee (Appendix - Jurisdictional Statement, pages 65-66). Thereafter, and during the pendency of the instant suit, a separate proceeding was instituted in the Chancery Court of Garland County, State of Arkansas, whereby appellee sought a modification of the Arkansas divorce decree previously awarded him, and on January 7, 1959, the Chancery Court of Garland County, State of Arkansas, modified said decree relieving appellee of the further payment of alimony to the appellant (Appendix - Jurisdictional Statement, pages 65-67).

At no time, either during the filing of voluminous pleadings, or during presentation of evidence before the Circuit Court of Raleigh County, West Virginia, did appellant plead or otherwise set forth the Arkansas jurisdictional divorce statute, which statute appears at pages 59-60 of the Appendix to the Jurisdictional Statement. Appellant likewise failed to explicitly and timely insist that said statute, as applied, was repugnant to the United States Constitution. The constitutionality of said statute was first belatedly raised by appellant on July 19, 1960, in her second application for an appeal directed to the Supreme Court of Appeals of West Virginia. This application, and the previous one, were both denied by said court. (Jurisdictional Statement, page 14).

The only complaint appellant made concerning the Arkansas divorce decree and the subsequent amending decree of that court, was that the Chancery Court of Garland County, had no jurisdiction because of the lack of domicile in the State of Arkansas, by appellee herein, for the requisite period of time. However, it will be noted that by appellant's own evidence, it was conclusively established that, not only had the parties solemnized their marriage in the State of Arkansas, but also that appellee herein had complied implicitly with the jurisdictional requirements of the Arkansas statute. He had physically and continuously resided in the State of Arkansas for the required period of sixty (60) days next before the commencement of his divorce action, and for three (3) full months next before the granting of the divorce decree.

In addition thereto, in the instant case appellant's evidence completely failed to establish the earnings and income of appellee, without which a decree for separate maintenance and support money could not be rendered in the State of West Virginia. Appellant's evidence merely demonstrated that from January 2, 1957 to January 22, 1959, appellee maintained a checking account in the Beckley National Bank, during which period of time numerous deposits and withdrawals were made by appellee and that the balance remaining therein on January 22, 1959, was Three Hundred Eighty-eight Dollars and Eighty-four Cents ($388.84). (Plaintiff-Appellant's Exhibit No. 1). Appellant's evidence also showed that appellee maintained a checking account in the Raleigh County Bank, Beckley, West Virginia, from January 14, 1957 to December 16, 1959, and that during that period of time made numerous deposits and withdrawals, and that the balance remaining therein on December 16, 1959, was One Hundred Eighty-five Dollars and Sixty-one Cents ($185.61) (Plaintiff-Appellant's Exhibit No. 2).

At the conclusion of appellant's evidence in the trial court, and when appellant had rested her case, appellee moved the court to dismiss appellant's bill of complaint and to enter a decretal judgment in his favor. The grounds assigned in support of said motion were, in substance:

(1) That appellant had failed to plead or prove the jurisdictional divorce statute of the State of Arkansas.

(2) That the evidence of appellant showed conclusively that appellee had resided in the State of Arkansas for the period required by the Arkansas statute, and that no fraud had been practiced upon the Arkansas Court.

(3) That the Circuit Court of Raleigh County, West Virginia, should accord full faith and credit to the Arkansas divorce decree.

(4) That there was no evidence adduced on behalf of appellant showing appellee's earnings and income upon which a decree for separate maintenance and support money could be based.

Taking said motion under advisement, the Circuit Court of Raleigh County, West Virginia, thereafter sustained said motion and dismissed appellant's bill of complaint and rendered a decretal judgment in favor of appellee. The oral opinion of the court was delivered from the Bench, and later transcribed and made a part of the record. The opinion in sustaining said motion was framed upon two grounds; namely, (1) The Circuit Court of Raleigh County, West Virginia, did accord full faith and credit to the Arkansas divorce decree because of appellant's evidence showing that appellee had complied implicitly with the jurisdictional requirements of the State of Arkansas, and that no fraud had been committed upon the Arkansas court by appellee; and (2) A decree for separate maintenance and support money could not be granted because of the failure

of appellant's evidence to show the earnings and income of appellee.

II

DISCUSSION OPPOSING JURISDICTION

(A) IS A SUBSTANTIAL FEDERAL QUESTION PRESENTED?

Appellant urges upon this Honorable Court the proposition that the Arkansas jurisdictional divorce statute in question is unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States. Appellant's position is premised upon the assertion that the statute in question does not meet the domiciliary requirements as contemplated by the case of WILLIAMS v. NORTH CAROLINA, 325 U. S. 226.

The Arkansas divorce statute in question requires, in substance, that the plaintiff seeking a divorce must prove a residence in the State of Arkansas for sixty (60) days next preceding the commencement of the action, and for three (3) full months before the final judgment granting the decree of divorce. The same statute defines the meaning of "residence" as being synonymous with "domicile" (Appendix - Jurisdictional Statement, pages 59-60).

A state statute defining its own construction will be given effect. 82 C.J.S., Statutes, Secs. 314-315.

In 1958, the Supreme Court of Arkansas determined the validity and constitutionality of this

statute in the case of WHEAT v. WHEAT, 318 S. W. (2d) 793. In pertinent part the court held that the statute was not unconstitutional under the full faith and credit or due process clauses of the Constitution of the United States. The opinion further indicates that the courts of other states are not compelled to accord full faith and credit to a divorce decree of the State of Arkansas but certainly permits them to do so. The courts of West Virginia will accord full faith and credit to judgments and decrees of the courts of other states where it is shown that such foreign court had jurisdiction of the subject matter and of the persons and that no fraud was committed upon the court. **Paull** v. **Cook**, 135 W. Va. 833, 65 S. E. (2d) 750; **Consumer Credit Company of Waynesburg** v. **Bowers**, 143 W. Va. 748, 104 S. E. (2d) 869.

Appellant also complains, pointing to impropriety of the substituted service upon her in the Arkansas divorce proceeding. The divorce decree demonstrates conclusively that the Arkansas statutory service requirements were strictly complied with and service properly obtained (Appendix - Jurisdictional Statement, page 62). In fact there is no contention that the provisions of the statute were not adhered to. Arkansas does not stand alone in providing for statutory substituted service of process, and it is noted that the State of West Virginia also so provides **West Virginia Code of 1955, Chapter 48, Article 2, Section 10.**

Surely, the Arkansas court had jurisdiction over the marital "res", the marriage between appellant

and appellee having been consummated in that state. Joining that fact with admitted strict compliance with the Arkansas Jurisdictional divorce statute, poses, we respectfully submit, no substantial Federal question. The statute has stood the test of time. No doubt thousands of divorces have been granted pursuant to its provisions. The public welfare of the people of this nation cannot be well served by the present belated attack upon its validity.

(B) WAS THE FEDERAL QUESTION SOUGHT TO BE REVIEWED TIMELY OR PROPERLY RAISED?

In the instant case, the Circuit Court of Raleigh County, West Virginia, entered a decree in favor of appellee and the Supreme Court of Appeals of West Virginia, although twice petitioned by appellant to review the decree, declined so to do, thus making the trial court the highest court of the state in which a decision could be had in this case. **Virginian Railway Company** v. **Mullens**, 271 U. S. 220.

Appellant now belatedly asserts that the Arkansas jurisdictional divorce statute is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that the Arkansas divorce decree based thereon is not entitled to full faith and credit under the provisions of Section 1, Article IV of said Constitution. Appellee submits that neither of these questions were raised in the Circuit Court of Raleigh County, West Virginia, by proper pleading or otherwise. It is a fundamental rule of practice and procedure in West Virginia that the question

of the constitutionality of a statute must be raised specifically in the trial court. **Volume I, Michie's Jurisprudence of Virginia and West Virginia, Appeal and Error, Section** 83; **State of West Virginia** v. **Michael,** 141 W. Va. 1, 87 S. E. (2d) 595; **Hulvey** v. **Roberts,** 106 Va. 189, 55 S. E. 585.

In fact, the constitutionality of the Arkansas jurisdictional divorce statute was never mentioned by appellant at any stage of the proceeding in the trial court. It is submitted that appellant did not make the required explicit and timely insistance in the trial court that the statute as applied was repugnant to the United States Constitution. **Charleston Federal Savings and Loan Association** v. **Alderson,** 324 U. S. 182; **Raley** v. **State of Ohio,** 360 U. S. 423.

The United States Supreme Court recognizes and follows the law of the state courts in respect to the manner and timeliness of the presentation of questions for review. **Stembridge** v. **State of Georgia,** 343 U. S. 541.

Therefore, it is respectfully submitted that the purported "constitutional" question was neither properly nor timely raised by this appellant.

(C) WAS THE FEDERAL QUESTION SOUGHT TO BE REVIEWED EXPRESSLY PASSED ON?

The purported Federal questions never having been explicitly and timely presented to the trial court were, of necessity, not passed upon by that

court. Appellant's applications to the Supreme Court of Appeals of West Virginia having been twice denied, the purported Federal questions necessarily were not passed upon by that court.

(D) DOES THE JUDGMENT OF THE LOWER COURT REST UPON AN ADEQUATE NONFEDERAL BASIS?

In addition to its holding that the Arkansas divorce decree was entitled to full faith and credit in West Virginia, the Circuit Court of Raleigh County, West Virginia, by its decree also specifically held that there was no evidence adduced on behalf of appellant upon which to bottom a monetary award for support and maintenance against the appellee. Patently, this finding was based upon the total lack of evidence tending to show earnings and income of appellee out of which support or maintenance money could be paid.

In the State of West Virginia, the authorities are uniform in holding that support and maintenance allowance can only be based upon earnings and income as required by the West Virginia statute (**Jurisdictional Statement, Footnote (2), page 3**); **Davis** v. **Davis,** 137 W. Va. 213, at pages 220-221, 70 S. E. (2d) 889; **Wolford** v. **Wolford,** 133 W. Va. 403, at page 41[illegible]56 S. E. (2d) 614.

The presentation of the checking account records of two banks in Beckley, West Virginia, showing deposits and withdrawals of Hunter Smith over a period of several months, is entirely inadequate to

sustain the required burden of proof. There was no showing as to what portions of the several deposits represented income; what portions of the withdrawals were for business expenses, and consequently no showing of the amount of net earnings or income, if indeed there were any at all, which remained for the depositor. In point of fact, the only single fact established by those records was that after a series of deposits and withdrawals, Hunter Smith had the sum of Three Hundred Eighty-eight Dollars and Eighty-four Cents ($388.84) in one bank, and One Hundred Eighty-five Dollars and Sixty-one Cents ($185.61) in the other. Obviously, no intelligent award could have been based upon such meager evidence, even if the appellant's cause of action had not been otherwise completely barred by the Arkansas divorce.

It is respectfully submitted that the Circuit Court of Raleigh County, that being the highest state court in which a decision could be had in this case based its decree, in part, expressly upon a substantial and sufficient nonfederal ground, and the Supreme Court of the United States should not take jurisdiction to review the decree. **Black** v. **Cutter Laboratories**, 351 U. S. 292; **Durley** v. **Mayo**, 351 U. S. 277.

III

CONCLUSION

For the foregoing reasons, it is respectfully submitted that appellee's motion should be sustained, and that the Supreme Court of the United States should refuse to take jurisdiction of this appeal.

Respectfully submitted,

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G. BERK LYNCH
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Beckley, West Virginia

Counsel for Appellee

PROOF OF SERVICE

STATE OF WEST VIRGINIA,

COUNTY OF RALEIGH, TO-WIT:

I, JOYCE SWEENEY, Stenographer and Secretary in the Offices of G. Berk Lynch and James M. Henderson, partners practicing law under the name of Lynch & Henderson, counsel of record for Hunter Smith, appellee, herein, depose and say that on the 4th day of April, 1961, I served two (2) copies of the foregoing Motion to Dismiss or Affirm, addressed to the Supreme Court of the United States in the case of Nettie Smith, appellant, against Hunter Smith, appellee, by delivering the same to the Secretary and Stenographer in the Office of J. W. Maxwell, counsel of record for Nettie Smith, located in The Raleigh County Bank Building, Beckley, West Virginia.

Joyce Sweeney

Taken, subscribed and sworn to before me in Beckley, West Virginia, this the 4th day of April, 1961, and in witness whereof, I have hereunto set my hand and official seal.

My commission expires:

Notary Public in and for Raleigh County, West Virginia.

(Notarial Seal)